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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ROBERT LOWELL MCGEE, Defendant and Appellant.	D035759 (Super. Ct. No. SCD146735)

APPEAL from a judgment of the Superior Court of San Diego County, Frank A. Brown, Judge. Affirmed.

A jury convicted Robert McGee of second degree murder (Pen. Code,[1] § 187, subd. (a)) and found true an allegation he personally used a deadly weapon in the commission of the offense (§ 12022.5, subd. (b)(1)). After McGee waived a jury trial, the court found true allegations he suffered a prior conviction in 1980 for assault with a deadly weapon, which served as both a "strike" and a serious felony prior conviction (§§

1 All statutory references are to the Penal Code unless otherwise indicated.

667, subds. (a), (b)-(i); 1170.12). The court sentenced McGee to an indeterminate term of 35 years to life, in part consisting of a 15-year term doubled under the "Three Strikes" law because of his prior strike conviction.

McGee contends the court prejudicially erred by instructing the jury that voluntary manslaughter requires an intent to kill; refusing to instruct the jury with his special instruction regarding the absence of flight; and instructing the jury with CALJIC No. 2.01, which violated his constitutional rights to due process and a jury trial. He further contends the court abused its discretion in refusing to vacate his 1980 prior strike conviction. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Case

On the morning of July 27, 1999, Patrick Skahill approached the house of his friend Earl Dryden, where Skahill had previously rented a room. Skahill noticed that Dryden was not sitting, as he typically did, at his desk near the front window. After Skahill knocked and entered, he saw Dryden lying on his side on the floor, having trouble breathing, with blood around his mouth and nose. Skahill knelt down beside Dryden and grabbed his shoulders to see what was wrong, then turned him back so blood could drain out of his mouth. Skahill observed Dryden's desk chair on its side on the floor; the sheet or blanket that normally covered the chair was resting in a pool of blood by the fireplace. On the floor near Dryden's hand was a small kitchen knife. A metal pipe was propped up on the wall near a filing cabinet.

Shortly after Skahill entered the house, McGee entered the front room from the kitchen, looking "pretty calm" but a "little surprised" to see Skahill. McGee told Skahill Dryden had come at him with a knife. Skahill told McGee to call 911 and McGee did so. McGee told the 911 operator Dryden came at him with the knife and in defense he (McGee) hit him a couple of times with a club; that Dryden had become "unglued" when he saw McGee was putting up security bars on his window and told McGee he did not want him living there anymore.

McGee recounted the morning's events to a San Diego police officer arriving at the scene. McGee told the officer he and Dryden had agreed McGee could install security bars on the window of McGee's bedroom. That morning, McGee had just returned from the hardware store where he purchased the galvanized pipe, and started to drill a hole in the wall. According to McGee, Dryden "all of a sudden" entered the room very upset and demanded to know what was going on, and McGee attempted to remind him of their agreement about the security bars. Dryden responded by stating he didn't care, that McGee was "bugging him" and began to walk toward the living room. McGee told the officer he followed Dryden, pleading with him to turn around so he could show him the pipe. According to McGee, Dryden turned around with either a steak or paring knife in his hands, and started shaking it at McGee, telling him he was "bugging" him and had been a tenant too long. When McGee told Dryden he was upset at how he was being treated and that Dryden was crazy and out of control, Dryden took two swipes at McGee with the knife from a distance of three to four feet. McGee told the officer he

instinctively hit Dryden in the head with the pipe, and because Dryden did not drop the knife, hit him another two or three times.

A forensic specialist collecting evidence from the house found, among other things, a wood-handled single-edged knife and a galvanized iron bar wrapped in electrical tape on a table in the living room. Hairs were stuck to the pipe at a point where there was a rip in the electrical tape, and red stains appeared on the opposite end of the tear. The pipe was bent in or around the middle area. The forensic specialist collected two more metal pipes wrapped in electrical tape, one from the bed in the southeast bedroom and another from a police officer at the scene. A plastic bag on the same bed contained bags of metal screws and rolls of electrical tape, as well as a Home Depot receipt dated July 27, 1999, reflecting the purchase of three rolls of electrical tape, two packages of fasteners, a package of straps and four pipes.

According to forensic pathologist Luis Pena, Dryden died as a result of blunt force trauma to his head. Pena found four lacerations on Dryden's scalp; one located at the left top of his scalp and two on the back of his head. Pena discovered a depressed fracture in the middle of the back of Dryden's skull, as well as multiple radiating fractures intersecting with the left side of his head and extending to the lower back of his skull. According to Pena, the left side of Dryden's skull was nearly pulverized. Dryden had a laceration on his palm consistent with injuries sustained in fending off an object. Pena further found a large nine by two and one-half inch bruise to Dryden's left upper back as well as two broken ribs, indicating he was struck on his back with tremendous force by a cylindrical type of object. Pena agreed one could assume Dryden was conscious when he

received his palm wound, but that he would have lost consciousness within up to 15 seconds after receiving any of the blows to his head.

San Diego Police Department criminalist Melvin Kong documented the physical and blood spatter evidence at the crime scene. Based upon his observations, notes and review of photographs, Kong concluded the origin of the bloodstain was in the living room between a table and fireplace. Based on his observations of the room, the blood spatters and Pena's testimony, he found it more likely that Dryden was seated rather than standing when he was beaten. Kong believed Dryden was in his chair or draped on the chair, bleeding for some period of time, in order to generate the blood appearing on the floor.

Crime scene reconstructionist Ron Englert offered his opinion on what had happened the morning in question after reviewing numerous reports including police, medical examiner, autopsy, and investigator's reports; photographs; clothing and other physical evidence; and the actual crime scene. According to Englert's analysis, Dryden would have been sitting in his chair and conscious when he received the first blow to the palm of his hand. Dryden was still sitting when he received the blows to the back of his head; according to Englert, he was not face-to-face with McGee as McGee told police. Englert noted the evidence, including certain blood marks, Dryden's location and the chair's position, were consistent with Dryden being pulled out of the chair, causing it to move and fall over, and being moved by someone else to the floor where he was found.

Defense Case

McGee testified on his own behalf, claiming he acted in self-defense. According to McGee, after entering McKee's room and complaining about the security bars, Dryden became irritated and walked into their kitchen. McGee followed him, and Dryden became upset, telling McGee he did not like having the same roommate for over one year; that McGee was "here too long," "bugging" him and was "too responsible" and "too neat." After McGee tried to calm him down for a few minutes, Dryden said he was going to cut coupons and removed a steak knife from the drawer. He and McGee walked into the living room together and McGee leaned the metal pipe against the wall. McGee left the living room to his bedroom for about one minute, returned to the living room and picked up the metal bar. As McGee began to return to his bedroom, Dryden told him he could not find his scissors. McGee testified that when he located them immediately, Dryden became angry and started shouting about "how responsible" McGee was. Shifting the knife to his right hand, he struck one of their cats. McGee asked Dryden why he was so upset and out of control; saying, "Are you going crazy?" According to McGee, Dryden became "absolutely livid" saying, "I'll show you who is crazy. Don't ever call me crazy." He slashed at McGee with the knife chin high and then quickly slashed back the other way. McGee testified he reacted very quickly, striking out at Dryden "two, maybe three" times. Dryden "kind of spun around" and bent over the chair and McGee struck him again, thinking about knocking the knife away from him. Dryden fell into the middle of the living room, bringing the chair down with him. McGee leaned the pipe down and was stepping into the hallway area when Skahill entered the room.

Dryden's neighbor Doris Caverl testified that at approximately 8:80 or 8:55 the morning of July 27, 1999, she heard Dryden shout, "You can't put up security bars," and, "You have to talk to the landlord." She heard Dryden continue to say he was sick and tired of things and that "he was going to throw him out." Caverl could not identify the person who responded, but testified he said calmly, "What for? I didn't do anything." Caverl did not hear the other man say anything about a metal bar.

Forensic scientist Barton Epstein testified that Dryden and McGee could have been facing each other during their confrontation because no one was able to testify what order the blows were inflicted upon Dryden's head, and several of them could have been inflicted without blood spatter. He testified there was no scientific way of saying all of Dryden's head blows occurred when he was sitting in the chair, although if Dryden's head were impacted, it would have been between three to six feet from the ground based upon the blood spatter on the wall. Nor could Epstein say how Dryden got from the location of the blood spatters to his resting place on the floor.

DISCUSSION

I. *Voluntary Manslaughter Instruction*

The trial court instructed the jury with CALJIC No. 8.40, the then-standard instruction on the elements of voluntary manslaughter containing language instructing that voluntary manslaughter requires an intent to kill.[2] Following McGee's trial, the

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[2] The court instructed the jury as follows: "Every person who unlawfully kills another human being without malice aforethought, but with an intent to kill, is guilty of voluntary manslaughter in violation of Penal Code section 192, subdivision ([a]). There

California Supreme Court decided *People v. Lasko* (2000) 23 Cal.4th 101 (*Lasko*) in which it concluded an intent to kill was not a necessary element of voluntary manslaughter and it was error to so instruct the jury. (*Lasko*, at pp. 107, 110-111; see also *People v. Blakeley* (2000) 23 Cal.4th 82, 93, fn. 5 (*Blakeley*).)

McGee contends the court's incorrect voluntary manslaughter instruction amounts to failing to fully instruct the jury on voluntary manslaughter as a lesser included offense, thereby depriving him of his due process rights. McGee further contends the error was of federal constitutional dimension, governed by the *Chapman v. California* (1967) 386 U.S. 18 prejudice standard. The People concede the instruction was erroneous, but maintain it is not reasonably probable McGee would have received a different result had the jury received proper instructions because (1) the jury rejected any heat of passion or imperfect self-defense theory and (2) the evidence in any event demonstrated McGee intended to kill Dryden.

We first reject McGee's assertion that the *Chapman* standard of prejudice should apply. As McGee acknowledges, under both *Lasko* and *Blakeley*, the precise error that occurred here is governed by the harmless error standard under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Lasko, supra,* 23 Cal.4th at p. 111; *Blakeley*, *supra*, 23 Cal.4th at p.

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is no malice aforethought if the killing occurred upon sudden quarrel or heat of passion or in the honest but unreasonable belief in the necessity to defend himself against imminent peril to life or great bodily injury. [¶] In order to prove this case, each of the following elements must be proved: One, that a human being was killed; two, that the killing was unlawful; three, that the killing was done with the intent to kill. [¶] A killing is unlawful if it was neither justifiable nor excusable . . . ."

93.) Nevertheless, McGee maintains that absent guidance from the United States Supreme Court, the law is not settled as to whether a noncapital defendant has a constitutional right to instruction on lesser included offenses and thus the *Chapman* standard should apply. But the silence of the United States Supreme Court on this issue is irrelevant where our state's high court has spoken on the issue. We decline to disregard our state high court's authoritative rulings, which we are bound to follow. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *People v. Williams* (1992) 8 Cal.App.4th 688, 702-703.)

Applying *Watson*, we agree with the People it is not reasonably probable McGee would have obtained a more favorable outcome in the absence of the error. (*Watson*, *supra*, 46 Cal.2d at p. 836; *Lasko*, *supra*, 23 Cal.4th at p. 111; *Blakeley*, *supra*, 23 Cal.4th at p. 93.) Our analysis is governed by *Lasko*, because here, as in that case, the jurors were instructed on the difference between murder and manslaughter by CALJIC No. 8.50; that murder as opposed to manslaughter requires malice, and in a case where the defendant acts under provocation or unreasonable self-defense, "even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent." Thus, as in *Lasko*, the jury was "told that regardless of whether [Dryden's] killing . . . was intentional or unintentional, defendant could not be convicted of murder unless the prosecution proved that, at the time of the killing, defendant was *not* acting in the heat of passion [or under the unreasonable belief in the need for self-defense]." (*Lasko*, *supra*, 23 Cal.4th at p. 112, emphasis in original; see also *Blakeley*, *supra*, 23 Cal.4th at pp. 88-89.) We observe the jury was further instructed the burden was on the People to

establish, beyond a reasonable doubt, each element of murder and that "the act which caused the death was not done in the heat of passion or upon sudden quarrel or, . . . in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury." It was also instructed, "If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder." Finally, the jurors were instructed they must consider the instructions as a whole in light of all the other instructions, and not single out any particular sentence or instruction. (CALJIC No. 1.01.) We presume the jury understood and followed these instructions.

Here, as in *Lasko*, the jury found McGee guilty of second degree murder, clearly rejecting his claim the evidence showed either heat of passion or unreasonable self-defense. In view of the instructions in their entirety, we must presume absent any evidence to the contrary (of which there is none) the jury found beyond a reasonable doubt McGee did not act in the heat of passion or under the unreasonable belief in the need for self-defense, irrespective of whether it found the killing intentional or unintentional. "In short, the presence or absence of an intent to kill is not dispositive of whether the crime committed is murder or the lesser offense of voluntary manslaughter." (*Lasko, supra*, 23 Cal.4th at p. 110; see also *Blakeley, supra*, 23 Cal.4th at p. 89 [an unlawful homicide committed with malice is murder whether or not the killer harbors the intent to kill].) McGee does not challenge the sufficiency of the evidence of his second

degree murder conviction here, implicitly conceding such a jury finding is with substantial support in the evidence.

McGee makes much of the fact the jury was not instructed with the lesser offense of involuntary manslaughter, arguing that because of this omission the jury had no choice but to default to murder if it concluded McGee did not harbor an intent to kill. He also argues: "It is highly likely the jury found provocation and used it as instructed in CALJIC Nos. 8.73 and 8.30[3], to assess the degree of the murder at second rather than first." Such arguments ignore basic appellate principles that require us to presume the jury correctly followed the court's instructions so that if it found provocation, it also in accordance with those instructions found the provocation insufficient to reduce the homicide to manslaughter. McGee has not pointed to anything in the record indicating the jury was in any way confused or hampered in its decision making; that it found no offense to "fit" its findings or that it had to somehow "default" to the crime of murder having no other choice. The mere theoretical possibility that the jury was affected by the erroneous instruction is not enough to require reversal of McGee's conviction. (*Blakeley*,

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3 CALJIC No. 8.30 provides: "Murder of the second degree is [also] the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation." CALJIC No. 8.73 provides: "If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation."

supra, 23 Cal.4th at p. 94 [*Watson* requires a reasonable probability, not a mere theoretical possibility, that the instructional error affected the outcome of the trial].)

Finally, as in *Lasko*, we conclude the evidence in this case strongly suggested McGee acted with the intent to kill Dryden. Such evidence includes the blood spatter and other evidence indicating Dryden was seated and turned away from McGee when he was beaten; Dryden sustained severe injuries caused by extremely forceful blows inflicted on the back and side of his head and his upper back. According to the forensic pathologist, Dryden would have become unconscious and dropped anything in his hands after the first blow to his head, which was inconsistent with the knife's placement next to his hand on the floor, a distance away from where Dryden's chair would have been located. That McGee did not immediately flee the scene does not require a different conclusion. He had no practical opportunity to leave before Skahill entered the house. Given the evidence, it is not reasonably probable the jury would have convicted McGee of the lesser offense of voluntary manslaughter had the court properly instructed the jury.

II. *Failure to Instruct on Absence of Flight*

McGee contends the court prejudicially erred by refusing to instruct the jury at his request that his failure to flee from the scene was an indication of innocence. He maintains his proposed instruction was a correct statement of law, and the court should have given it under case law holding a trial court may in its discretion, give such an instruction "when supported by the evidence and of sufficient relevance in the context of the case." (*People v. Williams* (1997) 55 Cal.App.4th 648, 652.) The contention is without merit.

We are unable to assess whether McGee's proposed instruction was a correct statement of the law, as the record contains no indication of the specific language McGee proposed to the trial court. We will not find error on this particular ground absent an adequate record. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502 [a judgment is presumed correct on appeal, and error must be affirmatively shown; failure to provide an adequate record on an issue requires that the issue be resolved against the appellant].) However, even assuming we had the specific proposed instruction before us, we would conclude the court did not abuse its discretion in refusing any such instruction.

In *People v. Green* (1980) 27 Cal.3d 1, the California Supreme Court ruled the trial court did not err in refusing to give a requested instruction on the absence of flight as tending to prove an innocent state of mind. (*Id*. at pp. 39-40, overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 and *People v. Martinez* (1999) 20 Cal.4th 225, 241; partially overruled and reinterpreted on other grounds in *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129.) The court in *Green* reasoned that while evidence of lack of flight might tend to prove the defendant's innocent state of mind, it nevertheless must be excluded under Evidence Code section 352 because its limited probative value is substantially outweighed by the danger that it will confuse the issues or mislead the jury. (*People v. Green*, at pp. 38-39 & fn. 25.) A defendant's lack of flight may be explained by any number of plausible reasons, thus the requested instruction would invite speculation. (*Id*. at pp. 37, 39; see also *People v. Staten* (2000) 24 Cal.4th 434, 459; *People v. Williams*, *supra*, 55 Cal.App.4th at p. 652.)

Here, as we have stated, the evidence as to McGee's presence in his apartment may be explained by the fact Skahill entered the apartment shortly after Dryden was killed, not simply because McGee decided to remain out of the absence of a guilty conscious. Indeed, under McGee's version of events, he would have had little, if any, practical opportunity to flee before Skahill entered the room and directed him to call 911. Given the range of possible explanations for McGee's actions, we conclude the court did not abuse its discretion in refusing to give his requested instruction on the absence of flight.

III. *CALJIC No. 2.01*

McGee contends the court violated his state and federal constitutional due process rights when it instructed the jury with CALJIC No. 2.01, regarding the sufficiency of circumstantial evidence.[4] He maintains the instruction "tells the jury to evaluate the sufficiency of the circumstantial evidence by determining whether it points to guilt or innocence" and that such evidence is sufficient if it does not point to innocence, thereby

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[4] The court read CALJIC No. 2.01 as follows: "However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only, one, consistent with the theory that the defendant is guilty of the crime; but two, cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt. [¶] Also, if the circumstantial evidence permits two reasonable interpretations, one of which points to the defendant's guilt and the other towards his innocence, you must adopt that interpretation which points to the defendant's innocence and reject that interpretation which points toward his guilt. [¶] But if, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

implying a lower standard of proof than proof of guilt beyond a reasonable doubt. As the Third District Court of Appeal persuasively did in *People v. Wade* (1995) 39 Cal.App.4th 1487, we reject this contention.

We begin with the well-established proposition that the correctness of jury instructions must be determined from the entire charge of the court, and not from a consideration of parts of an instruction or from a particular instruction. (*People v. Wilson* (1992) 3 Cal.4th 926, 943.) McGee focuses on the third paragraph of CALJIC No. 2.01, ignoring that in the same instruction, the jury is reminded of the prosecution's burden of proof; the instruction emphasizes that each fact or circumstance on which inferences essential to establish guilt necessarily rest must be proved beyond a reasonable doubt. Thus, in context within the challenged instruction, "no reasonable juror would apply the instruction in the manner suggested by defendant." (*People v. Wade, supra*, 39 Cal.App.4th at p. 1493.) Further, he ignores that the jury was instructed on the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt (CALJIC No. 2.90) and admonished to consider the instructional charge as a whole (CALJIC No. 1.01). In the context of the entire charge, no reasonable juror would have understood that the language of CALJIC No. 2.01 constituted a standard of proof instruction apart from the reasonable doubt standard set forth clearly in CALJIC No. 2.90. (See e.g. *People v. Estep* (1996) 42 Cal.App.4th 733, 739; see also *People v. Han* (2000) 78 Cal.App.4th 797, 809.)

Finally, as the court in *People v. Wade* observed: "[T]he challenged language [of CALJIC No. 2.01] did not tell the jurors they had to find defendant innocent in order not

to convict him. 'Innocence' in this jury instruction is used simply to connote a state of evidence opposing guilt. To say that evidence 'points to' innocence does not suggest that a defendant has to prove his innocence. The language is used simply as a status of not guilty, a kind of compass or direction signal indicating where the evidence points." (*People v. Wade*, *supra*, 39 Cal.App.4th at p. 1493.) In sum, even viewing the instruction independently, and especially in light of the charge as a whole, CALJIC No. 2.01 neither undermines the presumption of innocence and the reasonable doubt standard nor lessens the prosecution's burden of proving guilt beyond a reasonable doubt. We conclude there was no error in the giving of the instruction and it did not deprive McGee of his constitutional due process rights.

IV. *Motion to Dismiss Prior Strike Conviction*

McGee contends the court abused its discretion in refusing to strike his 1980 conviction for assault with a deadly weapon under section 1385. He maintains the following circumstances demonstrate he is outside the spirit of the Three Strikes law: (1) evidence of provocation (albeit insufficient for a defense) resulting from Dryden's comments suggesting he would have to move out of the house; (2) the 20-year age of his strike prior conviction; (3) his relatively insignificant criminal history; (4) his education and good character; and (5) his age (57) at the time of sentencing.

Section 1385 authorizes a trial court to vacate serious/violent felony priors "in the furtherance of justice." (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 504, 529-530.) Its discretion to strike such a prior is limited, however. (*Id*. at p. 530.) In exercising its discretion, the trial court must " ' "consider[] both . . . the constitutional

rights of the defendant, and *the interests of society represented by the People . . . .*" ' " (*Id*. at p. 530, quoting *People v. Orin* (1975) 13 Cal.3d 937, 945, italics in original.) It cannot act solely to accommodate judicial convenience or to alleviate court congestion; nor can it act on personal antipathy for the effect of the Three Strikes law while ignoring the defendant's background, the nature of his offense and other individualized considerations. (*Romero*, at p. 531.)

In *People v. Williams* (1998) 17 Cal.4th 148 (Williams), the court sought to render the concept of "furtherance of justice" in section 1385, subdivision (a) "somewhat more determinate." (*Id*. at p. 160.) It stated, "in ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. . . . [I]f [the court] is reviewing the striking or vacating of such allegation or finding, it must pass on the reasons so set forth." (*Id*. at p. 161; see also *People v. Garcia* (1999) 20 Cal.4th 490, 503.) The court again emphasized that "no weight whatsoever may be given to factors extrinsic to the [Three Strikes] scheme, such as the mere desire to ease court congestion or, a fortiori, bare antipathy to the consequences for any given defendant. [Citation.]" (*Williams*, 17 Cal.4th at p. 161;

People v. Garcia, at p. 498; see also *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 980.)

Under the applicable abuse of discretion standard, the "appellant who seeks reversal must demonstrate that the trial court's decision was irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

McGee does not explain why the court's ruling was arbitrary or capricious; he does not point to improper factors considered by the court or relevant factors the court failed to consider. He merely reiterates the evidence, facts and circumstances before the court and concludes they cumulatively require a finding he should be deemed outside the Three Strikes scheme's spirit. Such argument does not adequately demonstrate the court's ruling "falls outside the bounds of reason." (*Williams*, *supra*, 17 Cal.4th at p. 162.) Nor was the court's ruling an abuse of discretion. It considered various factors in declining to strike McGee's prior strike conviction, including the brutal nature of the current offense; McGee's history of past violence; McGee's psychological evaluations; and McGee's 15 years of law-abiding life after his latest felony conviction in 1985. It heard the facts surrounding McGee's 1980 strike prior conviction for assault with a deadly weapon, involving his firing a shot from a revolver at four store employees who were chasing him after he stole batteries from their store. One of the store employees was approximately

two feet away from McGee at the time. The court observed McGee "lived outside the law off and on throughout his life." It concluded: "And I think the [1980 prior strike conviction] speaks for itself. Matter of fact, the People of the State of California, that's why we have the Three-Strikes law, because we want to put people away who are dangerous. Not shoplifters, not small drug guys, but people who hurt people or have a potential. That's what the Three-Strikes law is all about." Based upon its consideration of these factors, we conclude the court acted in conformity with the Three Strikes law and was well within its discretion under section 1385 when it denied McGee's request to strike his prior conviction.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

KREMER, P. J.

McDONALD, J.